DISTRIBUTED
JUN 30 1992

No. 91-1831

Supreme Court, U.S.
FILED
JUN 26 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

THOMAS W. CARROLL, *et al.*,

Petitioners,

v.

DONALD M. BLINKEN, in his capacity as Chairman of the Board of Trustees of the State University of New York, *et al.*, and NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DOUGLAS FOSTER
MARTIN S. KAUFMAN*
*Counsel of Record

ATLANTIC LEGAL FOUNDATION
205 East 42nd Street
New York, NY 10017
(212) 573-1960

Attorneys for Petitioners

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES CITED ii

PRELIMINARY STATEMENT 2

I. THE COURT OF APPEALS APPLIED AN INCORRECT LEGAL STANDARD AND IGNORED THIS COURT'S DECISIONS ON COMPULSORY FUNDING OF POLITICAL SPEECH 3

II. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH A DECISION OF ANOTHER COURT OF APPEALS 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page

Cases

Abood v. Detroit Board of Education,
431 U.S. 209 (1977) 5, 6

Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987) 5

Buckley v. Valeo, 424 U.S. 1 (1979) 5, 6

Chicago Teachers Union v. Hudson,
475 U.S. 292 (1986) 5, 6

Galda v. Bloustein, 686 F.2d 159 (3d Cir. 1982) 8

Galda v. Rutgers, 772 F.2d 1060 (3d Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986) 7, 8

Keller v. State Bar of California,
496 U.S. 1 (1990) 5

Lehnert v. Ferris Faculty Association, 500 U.S. ___, 111 S. Ct. 1950, 114 L. Ed. 2d 572 (1991) 5, 6

New York State Club Association v. City of New York, 487 U.S. 1 (1988) 5

Roberts v. United States Jaycees,
468 U.S. 609 (1984) 5, 6

No. 91-1831

In The

Supreme Court Of The United States

October Term, 1991

THOMAS W. CARROLL, *et al.*,

Petitioners,

v.

DONALD M. BLINKEN, in his capacity as Chairman of the Board of Trustees of the State University of New York, *et al.* and NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

This reply to the briefs in opposition to the petition for a writ of certiorari is respectfully submitted because Petitioners believe strongly that the Respondents have mischaracterized the issues and have misstated the applicable law as established by decisions of this Court.

Petitioners will demonstrate that the Court of Appeals applied an incorrect legal standard and by so doing reached a conclusion seriously at odds with this Court's precedents. We will also show that the judgment and reasoning of the Court of Appeals is in conflict with that of the Court of Appeals for the Third Circuit.

This case involves claims by students at the State University of New York ("SUNY") that the payment of a portion of a **mandatory** student activity fee to the New York Public Interest Research Group, Inc. ("NYPIRG") amounts to coerced speech and coerced association, violating their constitutionally protected rights of speech and association because NYPIRG is an ideological organization which engages in political activity and political speech with which they do not agree and do not wish to be associated.

I

THE COURT OF APPEALS APPLIED AN INCORRECT LEGAL STANDARD AND IGNORED THIS COURT'S DECISIONS ON COMPULSORY FUNDING OF POLITICAL SPEECH

Respondents turn the issues presented by this case on their head by attempting to cover themselves with the banner of academic freedom. What this case involves, at root, is the opposite of academic and intellectual freedom: it involves the coerced financing by students of the political speech of an organization the Court of Appeals itself characterized as an "ideological organization" [App. 8A] which is engaged in political speech and quintessentially political activity [App. 14A], a group to which they do not belong, with which they disagree, and from which they derive no benefits.

Academic freedom is the freedom to inquire into subjects of one's choosing, to search for the truth, to embark on reasoning through a problem or question, to articulate an answer, to engage in scholarly debate, and to publish one's own proposed answer to the intellectual question. It does not apply to coerced subsidization of the scholarly speech of others. It certainly cannot be extended, without completely perverting its meaning, to forced funding of political speech and action of political groups such as NYPIRG. Such coerced support is antithetical to intellectual and academic freedom, for the issues taken up by NYPIRG are not intellectual but social and political, the proposed solutions involve political action, and there is no scholarly debate. Most important for the Petitioners, the issues are not chosen by them, their proposed solutions are not advocated by NYPIRG, and, indeed, NYPIRG's political speech and action is directed toward goals

that are antithetical to the interests of the student Petitioners[1].

Respondents also mischaracterize Petitioners' position and the issue in the case as the "garden-variety" objection to a student activity fee regulation [NYPIRG Brief at 8]. Even the Court of Appeals recognized that much more is involved than some students objecting to funding the cheerleader squad when it held that Petitioners' right to be free from compelled speech and compelled association "suffers" and "is compromised" when NYPIRG uses student funds "to raise issues on campus, organize the community and lobby the legislature in pursuit of [NYPIRG's vision of] 'economic and social justice.'" [App. 17A]

The crucial issue, then, is what standard is to be applied to determine whether the injury to the students' rights of free speech and free association caused by coerced funding of an ideological and political action group can be justified. The Court of Appeals held that the clear violations of fundamental First Amendment rights could be justified by "important" state interests, and that the mandatory fee was an acceptable means because "an alternative funding scheme would seem less likely to commit the university community to the goals of enriching campus life and promoting debate." [App. 24A]

This two-part test is, Petitioners submit, completely at variance with the criteria established by this Court. We argued in our Petition that the only proper justification for so patent an injury to First Amendment rights is a "compelling" government interest. Respondents urge that this test has not been applied to forced funding cases and that it has been applied only with

---

[1] Respondents' claim (NYPIRG Br. at 9, n 9) that acceptance of Petitioners' position would eliminate funding for all student groups is a classic red herring. Petitioners' claims arise because NYPIRG is engaged in political speech and action. No First Amendment rights are implicated by funding of the intramural or intercollegiate sports, the Glee Club, the debating team, the Math Society or the French Club.

respect to content-based restrictions on speech [NYPIRG Br. 12 and n. 14; SUNY[2] Br. 11].

The compelling state interest test is the test applied by this Court in coerced speech and association cases. In *Keller v. State Bar of California*, 496 U.S. 1, 9 (1990), this Court used the phrase "vital national interest" in describing the basis of the holding in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) that strictly limited infringements on First Amendment rights inherent in the agency shop were justified. In *Lehnert v. Ferris Faculty Association*, 500 U.S. , 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991), this Court characterized the justification in the labor union cases for requiring non-members to pay any dues or fees was the government's "vital policy interest" in labor peace and avoiding "free riders". In *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 302-303 (1986), the Court referred to a "government interest in labor peace strong enough to support [a]...limited infringement on nonunion employees' constitutional rights," and cited with approval the test employed in *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) that infringements on freedom of association "may be justified by regulations adopted to serve compelling state interests...that cannot be achieved through means significantly less restrictive of associational freedoms" (emphasis supplied) [*Hudson* at 303, n. 11]. Additionally, two more recent "freedom of association" cases employ the "compelling state interest" test: *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) and *New York State Club Association v. City of New York*, 487 U.S. 1, 23 (1988). Finally, but certainly not least, in *Buckley v. Valeo*, 424 U.S. 1, 25, this Court held that in the political sphere the right of expressive association can be limited only by regulations which serve a compelling interest unrelated to the suppression of ideas.

---

[2] We refer to the Brief of State Respondents as the "SUNY Br."

We respectfully submit that on the issue of "compelling" or "vital" state interest, this case is *a fortiori*, because the infringement of the free speech and association rights of the Petitioners is so patent and the political activity of NYPIRG is not a mere incident of its otherwise legislatively sanctioned role. The very fact that the Court of Appeals and Respondents appear confused on this point emphasizes the importance of this Court restating, perhaps more clearly than it has done in the union dues cases, the correct standard.

The Court of Appeals likewise erred in not requiring SUNY to use significantly less restrictive means to achieve the important government interests of encouraging extracurricular activities, giving students an opportunity to participate in "hands on" civics lessons, and fostering a forum of ideas. Even those cases Respondents cite for the proposition that something less than a "compelling" state interest will pass constitutional muster recognize that the imposition must be "narrowly tailored" or "least restrictive". Thus in *Abood*, although the Court held that collective bargaining was an important enough interest to justify some restrictions on dissenters' rights, it narrowly circumscribed the intrusion; thus in *Abood*, it held that union dues collected from non-members cannot be used to fund "political speech". And the Court, as it developed its union dues-dissenters' rights jurisprudence has narrowed the scope of the intrusion further. *See, e.g. Hudson* at 302 ("procedure must be carefully tailored"); *Lehnert* (chargeable activities "must not add to the burdening of free speech that is inherent in the allowance of an agency or union shop.") We have already alluded to the holdings of the "associational" rights cases, *e.g. Roberts* and *Buckley*, as to the limits on the permitted intrusion.

As we pointed out in the Petition, the SUNY student activity fee regulation itself provides the option of a voluntary fee. There is no logical or practical reason why the activity fee as a whole, or that part which funds political groups, cannot be voluntary. Moreover, as was pointed out in the Petition, there

are numerous opportunities for students to participate in civic and community organizations under the aegis of an established SUNY program for community work, none of whose more than 200 options except for NYPIRG is funded by the mandatory student activity fee. Finally, there is no reason in logic why a group which wishes to participate in the campus "forum" cannot do so with its own funds[3]. The notion of a forum of ideas as part of the academy, in keeping with principles of academic freedom, is completely inconsistent with coerced funding.

II

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH A DECISION OF ANOTHER COURT OF APPEALS

In its brief in opposition to the petition for writ of certiorari NYPIRG dismisses the conflict between the Second Circuit Court of Appeals decision in this case and the Third Circuit's decision in *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985), *cert. denied* 475 U.S. 1065 (1986)("Galda II") by stating that "the facts in *Galda* were entirely different." [NYPIRG Br. 14] Even Judge Owen in his decision acknowledged that the distinction between *Galda* and *Carroll* was "slender." [Supp. App. 14D] We have already shown, in the Petition, why the Circuits are in conflict.

Moreover, there is a substantial and basic conflict between the two circuits with respect to the appropriate test or burden that the state has to overcome the students' First Amendment rights. The Third Circuit in *Galda II* applied the

---

[3] Indeed, it is rather absurd for NYPIRG, which has a budget of more than $2.5 million, only about 30% of which is derived from student activity fees, to claim (NYPIRG Br. 10) that it will be excluded from the forum or silenced if it cannot rely on coerced financing.

"compelling state interest" test whereas the Second Circuit used a "substantial government interest" test. In its opinion in *Galda II* the Third Circuit applied the "compelling state interest" test; it made reference to that test no less than six times. In *Galda v. Bloustein*, 686 F.2d 159 (3d Cir. 1982)("*Galda I*") the Third Circuit Court of Appeals, in an opinion by Judge Adams (who later dissented in *Galda II*), also approvingly referred on six occasions to the "compelling state interest" test. In *Galda II*, in holding that the fee which the students at Rutgers had to pay to support NJPIRG violated their First Amendment rights, the Third Circuit concluded:

> "The University has thus failed to show any compelling state interest that would justify overriding the plaintiffs' First Amendment rights." (772 F.2d at 1068)(emphasis supplied)

The Second Circuit, on the other hand, as the respondents stress, did not apply the "compelling state interest" test but rather applied the "substantial state interest" test. Applying that test, the Second Circuit found that the state had met its burden, thereby overriding the First Amendment rights of the students and approving the collection of the fee, at least so long as it is used on campus. In applying a different test, the Third Circuit found that the state had not met its burden of overriding the First Amendment rights of the students and therefore held that the collection of the fee was unconstitutional.

The several conflicts between the Circuits cry out for clarification by this Court.

CONCLUSION

The issues raised in this case are of great importance. As was stated in the Petition, and reinforced by the *amicus* brief of Pacific Legal Foundation and several students at the University of California, the issue has far-reaching impact. The constitutional principles involved are profound. The confusion of at least one Court of Appeals is patent. The conflict between Circuits is apparent.

The petition for a writ of certiorari should be granted.

June 25, 1992

Respectfully submitted,

Martin S. Kaufman*
Douglas Foster

Atlantic Legal Foundation
Attorneys for Petitioners
205 East 42nd Street (9th Floor)
New York, New York 10017
(212) 573-1960
* Counsel of Record